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LEMBAGA KEMAJUAN TANAH PERSEKUTUAN & ANOR

v.

DR TAN KEE KWONG

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HIGH COURT MALAYA, KUALA LUMPUR
ZABARIAH MOHD YUSOF J
[SUIT NO: S-21NCVC-27-2011]
9 OCTOBER 2011

C

TORT: *Defamation - Slander - Whether a public body could sue for defamation - Whether plaintiffs had locus to maintain action against defendant - Whether words defamatory*

D

TORT: *Defamation - Slander - Whether words defamatory - Whether words referred to plaintiffs - Connection between individuals defamed and plaintiffs - Whether statements uttered by defendant cast adverse opinion about plaintiffs - Failure of - Whether proven that defendant uttered defamatory words to third party - Whether defendant responsible for publication of report*

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The plaintiffs sued the defendant for allegedly slandering and publishing words concerning the plaintiffs in a newspaper called Suara Keadilan. The first plaintiff ('FELDA') is the largest oil palm based plantation group in Malaysia, whilst the second plaintiff is an investment company which provides services to FELDA Holdings Bhd and its related companies. The defendant is a member of a political party known as Parti Keadilan Rakyat.

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The claim was based on an interview given by the defendant to a reporter of Suara Keadilan several days before 22 June 2010, wherein it was alleged that the defendant said that the decision to acquire a building (Menara FELDA) sometime in 2007, was left in the hands of only three individuals, namely the then Deputy Prime Minister, the President of the second plaintiff and a third individual who was not connected at all to FELDA ('the three individuals'). It was further alleged *inter alia,* (i) that the acquisition of Menara FELDA, valued at RM662 million, was to benefit cronies and not for the benefit of FELDA settlers and (ii) that such acquisition was one of the factors that had caused FELDA to allegedly become insolvent.

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The preliminary issue for consideration herein was whether a government or public body could sue for defamation. This aside, the following questions to be determined by this court, namely:

(a) whether the words complained of were defamatory in nature (b) whether those words referred to the plaintiffs and (c) whether the defendant had in fact uttered those words to the third party.

Held (dismissing the plaintiffs' claim with costs):

(1) FELDA was established on 1 July 1956 pursuant to s. 3 of the Land Development Act 1956 ('LDA 1956'). Section 15 of the LDA 1956 provides that FELDA shall be a body corporate. A Minister is currently in charge with the responsibility for FELDA and the Public Authorities Protection Act 1948 ('PAPA') applies to it. Although a corporation cannot maintain an action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management of their trade or business, and this without alleging or proving special damage. The plaintiffs have the *locus* to maintain the action against the defendant. (paras 18-20, 30 & 61)

(2) Defamatory statements regarding a firm or company are statements with regard to their mode of carrying on business, such as to lead people of ordinary sense to the opinion that they conduct their business badly and inefficiently. On the facts of this case, the statements made by the defendant that the acquisition of Menara FELDA was left to the decision of mere three individuals and that that had led to wastage impute that the first plaintiff was badly managed, they have no proper governance and conducted affairs in a dubious and unprofessional manner and made financial decisions which resulted in substantial losses. The words attacked the plaintiffs in the manner of conducting its affairs which led to a lot of financial wastage and now left FELDA into a state of bankruptcy. The words have accused the plaintiffs of mismanagement and had attacked its financial position. Such words were clearly defamatory, since the allegation of mismanagement certainly had a tendency to cast an adverse opinion of the plaintiffs and to lower the estimation of the plaintiffs and in the eyes of the public and society. (paras 65, 69, 70 & 72)

(3) Although the interview referred to the three individuals, the allegation is not confined to the three individuals. Rather, the sting of the allegation is directed at the plaintiffs because what is stated in the article is that the decision to build the building was decided by the three individuals. That imputes a shoddy

kind of corporate governance and management in the plaintiffs. Hence, the defamatory words referred to the plaintiffs. (para 81)

(4) It is the burden of the plaintiffs to prove that the defendant published or caused to be published the alleged defamatory words. For there to be publication, the plaintiffs must prove that there was communication of the words to the third party, *ie*, the reporter for Suara Keadilan. This the plaintiffs failed to do, as the relevant reporter had not been called to give evidence. (paras 89 & 92)

(5) The plaintiffs had also failed to prove that the defendant was responsible for the publication of the report. Suara Keadilan was the one who published the words. The plaintiffs have not proved that the defendant knew or ought to have known that what he purportedly said would be published or that he intended or caused the article to be published. (paras 96 & 108)

Case(s) referred to:

Adam v. Ward [1915] 31 TLR 299 ***(refd)***
Ballina Shire Council v. Ringland [1994] 33 NSWLR 680 ***(not foll)***
Blackshaw v. Lord [1984] 1 QB 1 ***(refd)***
Bognor Regis Urban District Council v. Campion [1972] 2 QB 169 ***(not foll)***
Chee Siok Chin & Ors v. Minister for Home Affairs and Another [2006] 1 SLR 582 ***(refd)***
Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***
City of Chicago v. Tribune Co [1923] 139 NE 86 ***(refd)***
Dato' Seri S Samy Vellu v. Penerbitan Sahabat (M) Sdn Bhd & Ors [2005] 3 CLJ 440 HC ***(refd)***
Derbyshire County Council v. Times Newspaper Ltd & Ors [1993] AC 534 ***(not foll)***
Karpal Singh v. Sultan of Selangor [1987] 2 CLJ 342; [1987] CLJ (Rep) 686 HC ***(refd)***
Mayor, Citizens and Alderman and Manchester v. Williams [1891] 1 QB 94 ***(refd)***
National Union of General and Municipal Workers v. Gillian [1946] KB 81 ***(refd)***
New York Times v. Sullivan [1964] 376 US 254 ***(not foll)***
R v. Secretary of State for the Home Department Ex-Parte Blind [1991] AC 686 ***(refd)***
Samant N Balakrishna v. George Fernandez [1969] 3 SCR 603 ***(refd)***
South Hetton Coal Company Limited v. North Eastern News Association Ltd [1894] 1 QB 133 ***(foll)***
Sulaiman Mat Tekor & Ors v. National Population and Family Development Board [2008] 10 CLJ 581 HC ***(refd)***

Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1982] 1 LNS 83 HC ***(refd)***
Toogood v. Spyring [1834] 1 CM & R 181 ***(refd)***
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 60(1)(b)
Federal Constitution, art. 10
Land Development Act 1956, ss. 3, 15, 64, 65
Local Government Act 1976, ss. 2, 10

European Convention for the Protection of Human Rights and Fundamental Freedoms [UK], art. 10

For the plaintiffs - Dato Mahinder Singh (Dato Firoz Hussein & Cheng Mai with him); M/s Hafarizam Wan & Aisha Mubarak
For the defendant - Ranjit Singh (Razlan Hadri & Ho Kok Yew with him); M/s Owee Ho

Reported by EM Goh

JUDGMENT

Zabariah Mohd Yusof J:

[1] This is a claim by the plaintiffs against the defendant for allegedly slandering and publishing words concerning the Plaintiffs in the way of their business and in relation to their conduct therein in a newspaper called Suara Keadilan.

[2] At the end of the trial I dismissed the claim of the Plaintiff. Below are my reasons for the said dismissal.

Background

[3] The 1st plaintiff is the largest oil palm based plantation group in Malaysia and it was established to carry out and implement development projects in areas owned by the 1st plaintiff and its companies.

[4] The 2nd plaintiff is an investment company consisting of investment holding, assisting, planning, controlling, managing and providing share services to Felda Holdings Berhad and its related companies.

[5] The defendant is a member of a political party known as Parti Keadilan Rakyat.

[6] It was pleaded that several days prior to 22 June 2010, the defendant gave an interview to one Faizal Zakaria, a reporter (hereinafter referred to as "the reporter") of the newspaper known as Suara Keadilan, wherein the defendant allegedly slandered and published of and concerning the plaintiffs and of them in the way of their business and in relation to their conduct therein, to the reporter the following defamatory words or similar words (collectively referred to as "the defamatory Words"):

(a) Hanya tiga individu yang terlibat dalam membuat keputusan pembinaan bangunan baru Felda yang dianggarkan bernilai RM662 Juta:

(b) Kemusykilan timbul apabila kelulusan pembinaan bangunan di kawasan itu dilakukan oleh anak syarikatnya, Felda Global Ventures Holding Sdn Bhd (Felda Global) yang diketuai Presidennya Datuk Mohd Bakke Salleh tanpa pengetahuan pengerusi dan ahli lembaga pengarah;

(c) Sekitar tahun 2007, tanpa pengetahuan pengerusi dan Ketua Pengarah Felda, satu pertemuan diadakan di Pejabat Timbalan Perdana Menteri, Datuk Seri Najib di Putrajaya, turut sama dalam pertemuan itu adalah Allahyarham Tan Sri SM Nasimuddin SM Amin, mewakili NAZA TTDI dan juga Pengarah Urusan Felda, Datuk Mohd Bakke Salleh;

(d) Pembinaan bangunan itu yang hanya diputuskan oleh tiga individu sahaja menjadi satu faktor berlakunya begitu banyak pembaziran yang menyebabkan Felda kini menuju kearah kebankrapan;

(e) Pertemuan yang hanya melibatkan tiga orang sahaja telah memutuskan agar pembinaan bangunan itu dipindahkan dari dibina atas tanah sendiri ke kawasan mempunyai nilai tanah yang mahal dengan alasan untuk menjalankan status pejabat baru Felda bertaraf lima bintang;

(f) Perdana Menteri pada waktu itu Tun Abdullah Ahmad Badawi juga telah bersetuju untuk melakukan perasmian pecah tanah tetapi akhirnya keputusan tiga orang sahaja yang jelas mempunyai kepentingan tertentu membatalkan keputusan tersebut memindahkan pembinaan di atas tanah sendiri ke kawasan tanah milik orang lain yang jauh lebih tinggi nilainya.

[7] The plaintiff alleged that the defendant had caused and/or permitted to be printed in the Suara Keadilan dated 22 June 2010 - 29 June 2010, to be printed and published of the plaintiffs and each of the defamatory words or similar words, in an article with a caption on the first page entitled "Kontroversi" with a photograph and with further continuation to the article on the 3rd page entitled "Bina Bangunan RM662 Juta Hanya Libatkan Tiga Individu" (hereinafter referred to the said article"). The plaintiff alleged that the defamatory Words uttered and published by the defendant, were republished in the article in the following manner.

> Timbalan Pengerusi Biro Perhubungan Antarbangasa KEADILAN, Datuk Dr Tan Kee Kwong mendedahkan hanya tiga individu yang terlibat dalam membuat keputusan pembinaan bangunan baru Felda yang dianggarkan bernilai RM662 Juta.
>
> Menurutnya, kemusykilan timbul apabila kelulusan pembinaan bangunan di kawasan itu dilakukan oleh anak syarikatnya, Felda Global Ventures Holding (Felda Global) yang diketuai Presidennya, Datuk Bakke Salleh tanpa pengetahuan pengerusi dan ahli lembaga pengarah.
>
> Sekitar tahun 2007, tanpa pengetahuan pengerusi dan Ketua Pangarah Felda, satu pertemuan diadakan di pejabat Timbalan Perdana Menteri, Datuk Seri Najib di Putrajaya, turut sama dalam pertemuan itu adalah Allahyarham Tan Sri SM Nasimuddin SM Amin, mewakili NAZA TTDI dan juga Pengarah Urusan Felda, Datuk Bakke Salleh.
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> Menurut Dr Tan, pembinaan bangunan itu yang hanya diputuskan oleh tiga individu sahaja menjadi satu factor berlakunya begitu banyak pembaziran yang menyebabkan Felda kini menuju kearah kebankrapan.
>
> Pertemuan yang hanya melibatkan tiga orang sahaja telah memutuskan agar pembinaan bangunan itu dipindahkan dari dibina atas tanah sendiri ke kawasan mempunyai nilai tanah yang mahal dengan alasan untuk menjalankan status pejabat baru Felda bertaraf lima bintang.
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> ...
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> Perdana Menteri waktu itu Tun Abdullah Ahmad Badawi juga telah bersetuju untuk melakukan perasmian pecah tanah tetapi akhirnya keputusan tiga orang sahaja yang jelas mempunyai kepentingan tertentu membatalkan keputusan tersebut dengan memindahkan pembinaan diatas tanah sendiri ke kawasan tanah milik orang lain yang jauh lebih tinggi nilainya.

[8] The plaintiffs alleged that the defamatory words, in their natural and ordinary meaning and/or by inference or *innuendo*, read together and/or separately, are meant to refer to either the 1st plaintiff and/or 2nd plaintiff and were understood to mean:

(i) That the acquisition and building of the Felda building at the golden triangle (Acquisition of Menara Felda) was to benefit cronies;

(ii) That the acquisition of Menara Felda was solely to benefit certain individuals and not for the plaintiffs' benefit of Felda settlers;

(iii) That the transaction of the Felda Building has caused the plaintiffs' losses;

(iv) That the decision regarding the Acquisition of Menara Felda involved only certain individual without any board approval;

(v) That the terms of transaction of the Acquisition of Menara Felda were dubious;

(vi) That the decision regarding the Acquisition of Menara Felda was wrongful and involved corruption;

(vii) That only three individuals made the decision on the Acquisition of Menara Felda and it was done without the knowledge of the chairman and the board of directors of the plaintiffs;

(viii) The Acquisition of Menara Felda is one of the factors that has caused Felda to allegedly become insolvent;

(ix) That the plaintiffs did not comply with the law and sound corporate governance in the Acquisition of Menara Felda;

(x) That the plaintiffs are involved in corruption;

(xi) That the plaintiffs committed an unlawful act;

(xii) That the plaintiffs committed a criminal offence;

(xiii) That the plaintiffs are involved in a dishonest transaction;

(xiv) That the plaintiffs are not entities which one would want to conduct business with.

[9] The plaintiffs alleged that by reason of the publication of the defamatory words, the plaintiffs have been gravely injured in their reputation. The plaintiffs averred that the allegations are so

serious that the plaintiffs would be held in contempt and odium by the general public and society at large both in Malaysia and internationally. The damage to the reputation of the plaintiffs in the eyes of the Felda Settlers is particularly grave and extensive. The damage to the plaintiffs' reputation are of a magnitude that would last for years in view of the wide publication and distribution of the said newspaper and the large interest of the plaintiffs' economic activities and the role in the economy of Malaysia and its interests globally.

[10] The plaintiffs are claiming damages in the sum of RM200,000,000 for aggravated and exemplary damages and an injunction to restrain the defendant or his agents from further publishing the defamatory words whether it be oral or in printed media or in the internet.

[11] The defendant in his defence admitted that he did give an interview to the reporter of Suara Keadilan but emphatically averred in para. 4 of his defence that the words complained of at paras. 4(a) - 4(F) were never said by him. The defendant pleaded that he never used the word "kebangkrapan". Further and in any event, if such words were said, the defendant particularly pleaded that:

(a) The defendant did not use the word "kebangkrapan" during the said interview;

(b) The words did not refer to the plaintiffs;

(c) In any event, even if the words refer to the plaintiff, they were not defamatory of the plaintiffs.

[12] The defendant further raised the defence of justification, qualified privilege and fair comment.

[13] Before the trial proceeded, the defendant raised a preliminary point which required the court to determine before the trial. It is with regards to the capacity of the plaintiffs to sue in defamation. After hearing submissions from both parties on the matter, I ruled that the plaintiffs have the capacity to sue in defamation.

[14] Subsequently the case proceeded to full trial where the plaintiff called four witnesses. After the close of the plaintiffs' case, the defendant submitted no case to answer.

[15] After hearing submissions from both parties after the full trial, I dismissed the plaintiffs' claim with costs.

The Courts Findings

Preliminary Issue: Whether The Plaintiffs Have The Capacity To Sue In Defamation

[16] The defendant raises a preliminary point before the trial ie, whether a government/public body can sue for defamation.

[17] Consequently, the issue to be considered is whether Felda falls under such a principle.

[18] The 1st plaintiff or FELDA as it is well known was established on 1 July1956 pursuant to s. 3 of the Land Development Act 1956 (referred to as "the Act"). The duties and powers of Felda are set up under s. 3(2) and (3).

[19] Section 15 of the Act provides that Felda shall be a body corporate. It is a body set up to, *inter alia* undertake and carry out land development projects and related activities to promote and stimulate economic, social, residential, agricultural, industrial and commercial development (s. 3(2) of the Act).

[20] A Minister is currently in charge with the responsibility for Felda and such Minister is given the powers under the Act. (s. 2 of the Act).

[21] Felda itself has the power to undertake various activities to discharge its duties, including with the approval of the Minister to establish or promote the establishment of companies to carry on or engage in any activity which has been planned or undertaken by the authority. (Section 3(3) of the Act). Example of such companies is the 2nd plaintiff which is a wholly owned subsidiary of Felda pursuant to s. 3(3) of the Act. It was incorporated to carry out the activities of Felda.

[22] The Public Authorities Protection Act 1948 applies to Felda and its officers. (s. 65 of the Act).

[23] First and foremost, it is to be noted that one of the issues that is to be tried as stated in para. 10 of the "statement of issues to be tried" which had been filed by parties is whether the plaintiffs have the necessary capacity to bring an action for defamation or malicious falsehood by reason that the 1st plaintiff

is a statutory authority set up under the Land Development Act 1957 and the 2nd plaintiff is a wholly owned subsidiary of the 1st plaintiff.

[24] I will confine myself to this "issue which is to be tried" as the preliminary point which I have to determine herein.

[25] The English Court of Appeal in the land mark decision of *Derbyshire County Council v. Times Newspaper Ltd & Ors* [1993] AC 534 ruled that local authorities and other government bodies could not sue for defamation. The case involved a plaintiff which is a local authority and it went up until the House of Lords.

[26] Before the decision *Derbyshire County Council v. Times Newspapers Ltd & Ors*, there were two conflicting decisions in England with regards to the capacity of local authorities to sue in libel ie, *Mayor, Citizens and Alderman and Manchester v. Williams* [1891] 1 QB 94 and *Bognor Regis Urban District Council v. Campion* [1972] 2 QB 169.

[27] In *Mayor, Citizens and Aldermen of Manchester v. Williams*, a divisional court consisting of Day J and Lawrence J found that the statement of claim relied on by the municipal corporation disclosed no cause of action. The action was brought by a Municipal Corporation to recover damages for an alleged libel in a letter written by the defendant to a newspaper alleging that "in the case of two, if not three, departments of our Manchester City Council, bribery and corruption have existed, and done their nefarious work." The judgment of Day J was reported as follows:

> This is an action brought by a municipal corporation to recover damages for what is alleged to be a libel on the corporation itself, as distinguished from its individual members or officials. The libel complained of consists of a charge of bribery and corruption. The question is whether such an action will lie. I think it will not. It is altogether unprecedented, and there is no principle on which it could be founded. The limits of a corporation's right of action for libel are those suggested by Pollock C.B. In the case which has been referred to. A corporation may sue for a libel affecting property, not for one merely affecting personal reputation. The present case falls within the latter class. There must, therefore, be judgment for the defendant.

[28] In the Court of Appeal case of *Bognor Regis Urban District Council v. Campion* [1972] 2 QB 169, the defendant had distributed a leaflet attacking the Council (plaintiff) at a meeting of a ratepayer's association and Browne J found for the plaintiff.

Browne J had applied *National Union of General and Municipal Workers v. Gillian* [1946] KB 81 where the Court of Appeal in that case ruled that a trade union could maintain an action in libel or any tort. Browne J at p. 75 said that:

> Just as a trading company has a trading reputation which it is entitled to protect by bringing an action for defamation, so in my view the plaintiffs as a local government corporation have a "governing" reputation which they are equally entitled to protect in the same way - of course, bearing in mind the vital distinction between defamation of the corporation as such and defamation of its individual officers or members. I entirely accept the statement made in Galley on *Libel and Slander*, 6th Ed (1967), p 409, para 890: 'A corporation or company cannot maintain an action of libel or slander for any words which reflect, not upon itself, but solely upon its individual officers or members.' Then there is a quotation: 'To merely attack or challenge the rectitude of the officers or members of a corporation, and hold them or either of them up to scorn, hatred, contempt, or obloquy for acts done in their official capacity, or which would render them liable to criminal proceedings, does not give the corporation a right of action for libel.' I stress the words "solely" and "merely" in those passages. The quotation given in Gatley there is from United States case, *Warner v. Ingersoll* [1907] 157 Fed. R.

[29] Browne J found in favour of the Council when he was of the view that "the plaintiff as a local government corporation have a "governing" reputation which they are equally entitled to protect in the same way."

[30] Similarly in the case of *South Hetton Coal Company Limited v. North Eastern News Association Ltd* [1894] 1 QB 133, it was determined that although a corporation cannot maintain an action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management of their trade or business, and this without alleging or proving special damage.

[31] It is to be observed that the approach taken by the Court of Appeal in *Derbyshire County Council v. Times Newspaper Ltd & Ors* was premised on the uncertainty in the laws of England prevailing at that time (ie, with the two conflicting decisions in *Mayor, Citizens and Alderman and Manchester v. Williams and Bognor Regis*'s case) upon the issue arose in the *Derbyshire* case. This is clearly stated in the judgment at p. 550 where the House of Lords said that:

> The Court of Appeal approached the matter upon the basis that the laws of England was uncertain upon the issue lying at the heart of the case, having regard in particular to the conflicting decisions in *Manchester Corporation v. Williams* [1891] 1 QB 94 and *Bognor Regis District Council v. Campion* [1072] 2 QB 169 and to the absence of any relevant decision in the Court of Appeal or in this House.

[32] Faced with that situation, the Court of Appeal thought that it was appropriate to have regard to the European Convention. This is evidently clear from the judgment of Balcombe LJ in the Court of Appeal in the same case that when he said that having examined other authorities he concluded, "having carried out the balancing exercise requisite for purposes of art. 10 of the Convention, that there was no pressing social need that a corporate public authority should have the right to sue in defamation for the protection of its reputation."

[33] However, if one is to peruse *Bognor Regis Urban District Council v. Campion*, the case was only decided on the basis that a local authority could not sue for libel in respect of an imputation of bribery and corruption. Thus, the basis of the decision was the wrong conclusion that a local authority cannot commit those offences. This was the argument forwarded by the plaintiff's counsel in the *Derbyshire County Council v. Times Newspaper* Limited in the House of Lords at p. 537 of the report.

[34] Lord Keith in *Derbyshire County Council v. Times Newspaper Ltd & Ors*, was of the view that "not only is there no public interest favouring rights of organs of government, whether central or local, to sue for libel ... it is contrary to the public interest."

[35] I disagree with this proposition. There is the need for organs of local authorities to protect its reputation. In fact it is in the public interest to do so and the need to be able to do so is indeed real and pressing. Damage to reputation may affect the ability of local authorities to obtain loans, borrow money or tender for contracts not to mention that public may not be too keen to be part of the staff of such body, which may crippled the functions of the local authority. This was in fact acknowledged by Lord Keith in the *Derbyshire County Council* case when he said at p. 547 that:

> The trade union cases are understandable upon the view that defamatory matter may adversely the union's ability to keep its members or attract new ones or to maintain a convincing attitude towards employers. Likewise in the case of a charitable

A organization the effect may be to discourage subscribers or otherwise impair its ability to carry on its charitable objects. Similar considerations can no doubt be advanced in connection with the position of a local authority. Defamatory statements might make it more difficult to borrow or attract suitable staff and thus affect adversely the efficient carrying out of its functions.

B

[36] Lord Keith also referred to the statement of Chief Justice Thompson in the Supreme Court of Illinois (in *City of Chicago v. Tribune Co* [1923] 139 NE 86 in [1993] AC 534) that "every citizen has the right to criticize an inefficient or corrupt government
C without fear of civil as well as criminal prosecution." And that "it is of the highest public importance that a democratically elected government body, or indeed any government body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of
D speech."

[37] In the US, the Supreme Court in *New York Times v. Sullivan* [19645] 376 US 254, recognized that the 1st amendment which protects an individual freedom of speech and expression
E protects even speech and expression that is defamatory. The Supreme Court discussed the first amendment to the constitution which states in part that "congress shall pass no law abridging freedom of speech or of the press." The Supreme Court was of the view that the 1st amendment exists to help protect and foster
F the free flow and exchange of ideas, particularly on public and political issues.

[38] When referring to the US cases, one should treat with caution when addressing freedom of speech due to the first
G amendment and it should be merely instructive though not necessarily persuasive.

[39] The First Amendment of the Constitution of the United States of America, was ratified on 15 December 1791. It was subsequently extended to bind the constituent States of the Union
H by Amendment XIV which was ratified on 28 July 1869.

[40] If one is to impose the decision of *New York Times v. Sullivan* in Malaysia, that would be in contradiction with the provisions of our Federal Constitution. Freedom of speech in
I Malaysia is in terms of art. 10 of the Federal Constitution ie, subject to or restricted by the law of defamation. Article 10 of the Federal Constitution reads:

10(1) Subject to Clauses (2), (3) and (4):

(a) Every citizen has the right to freedom of speech and expression;

(b) All citizens have the right to assemble peaceably and without arms;

(c) All citizens have the right to form associations.

(2) Parliament may by law impose:

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

(b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part

(c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the federation or any part thereof, public order or morality ...

(3) Restrictions on the right to form associations conferred by paragraph (c) of Clause (1) may also be imposed by any law relating to labour or education.

(4) In imposing restrictions in the interest of security of the federation or any part thereof or public order under Clause 2(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

[41] This is akin to the stipulation in art. 10 of the European Convention of Human Rights. Hence art. 10 of the Malaysian Federal Constitution and art. 10 of the European Convention of Human Rights cannot be equated to the First Amendment and Amendment XIV which states in part that "congress shall pass no

law abridging freedom of speech or of the press." Clearly, freedom of expression in the United States is so extensive and uninhibited which cannot be superimposed to our country.

[42] By art. 10, our founding fathers of the Federal Constitution, after much deliberation on the local circumstances of the country, chose the policy of balancing freedom of speech and expression against certain other individual rights, including the protection of reputation. That balance can be achieved in the evolvement of the law in well known defences for defendants in defamation cases, as modified by statute.

[43] In Australia, in *Bailing Shire Council v. Ringland* [1994] 33 NSWLR 680, Arthur Murray Gleeson AC, endorsed the constitutionally implied right to freedom of political communication and concluded that councillors could not sue for defamation on statements about their performance. It would seemed that the majority were persuaded to follow the reasoning in Derbyshire so as to promote consistency with the international human rights law in respect of freedom of political communication.

[44] As far as Felda is concerned, it is a statutory body established under the Land Development Act 1956. As far as our law is concerned, statutory bodies are entities which are legally speaking independent of the government. Refer to *Sulaiman Mat Tekor & Ors v. National Population and Family Development Board* [2008] 10 CLJ 581 where Hishamuddin J held that:

> [2] The defendant is a statutory authority/body established under an Act of Parliament, namely, the Population and Family Development Act 1966 (Revised 1988) ('the Act'). Under s. 3 of the Act, the board of the defendant ('the board') is known by the name of 'National Population and Family Development Board'. The board is established as a body corporate with a perpetual succession and a common seal. Like any other typical statutory authority/body, the board may sue and be sued, may enter into contracts, including employment contracts with its employees; and may hold property. In other words, the board, like any other corporation, is clothed with a legal personality.
>
> [3] Statutory bodies (or statutory authorities) are entities which are, legally speaking, largely (but not absolutely, as they are subject to some degree of ministerial control) independent of the government. Employees of statutory bodies are not public servants in the sense that they do not belong to the public services under art. 132 of the Federal Constitution.

> As such, they do not enjoy the protection of arts. 135, 136 and 146 of the Federal Constitution. Their contracts of service are not with the Federal Government, but with the respective statutory authorities. Although for the sake of uniformity it is the Federal Government policy that statutory authorities are to adopt Service Circulars issued by the Public Service Department ('the PSD' - a very important department of the Federal Government that manages and controls services matters pertaining to government employees of all ranks) in cases where such circulars are intended to apply to statutory bodies, nevertheless, such service circulars do not automatically apply to such bodies. Hence, in the case of the defendant, for example, for any service circular issued by the Public Service Department to apply to the defendant, the board must first adopt that service circular by way of regulations.

[45] Section 64 of the Act states that its officers are deemed to be public servants. This is just a deeming provision. If the officers are indeed public servants, there is no necessity to have such a provision to state explicitly that they are public servants. The provision has an artificial connotation. Refer to *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1982] 1 LNS 83; [1983] 1 MLJ 323 where Edgar Joseph J stated at p. 325 that:

> ... that its employees and officers shall be deemed public servants within the meaning of section 21 of the Penal Code (section 126). Now the "deemed" in a statute sometimes has an artificial connotation which would not otherwise apply. As Viscount Simonds said in *Barclay Bank v. I.R.C* ....:
>
> > I regard its primary function as to bring in something which would otherwise be excluded.

[46] Similarly with s. 65 of the Act where it provides that Public Authorities Protection Act 1948 shall apply.

[47] These two sections (ss. 64 and 65) do not make Felda a Public Authority.

[48] Neither can it be said to be a local authority. "Local Authority" is defined under s. 2 the Local Government Act 1976 as:

> "local authority" means any City Council, Municipal Council or District Council, as the case may be, and in relation to the Federal Territory means the Commissioner of the City of Kuala Lumpur appointed under section 4 of the Federal Capital Act 1960 [Act 190]

[49] Clearly the plaintiffs do not fall within the definition.

[50] Further it is to be noted that s. 10 of the Local Government Act 1976 provides that the local authority shall consists of the Mayor or president and Councilors who shall be appointed by the State Authority. These councilors are not "democratically" elected as envisaged by the judgment of Lord Keith in *Derbyshire County Council v. Times Newspaper Limited*.

[51] Even assuming for a moment that Felda is a local authority or public authority (which I am of the view that it is not), I am not inclined to apply the decision of the *Derbyshire* here because:

(i) In both the House of Lords case of *Derbyshire County Council v. Times Newspaper Ltd & Ors* and NSW Court of Appeal in *Ballina Shire Council v. Ringland* [1994] 33 NSWLR 680, reference was made to international conventions on human rights to which UK and Australia respectively are parties which involves different protection of free speech. It was concluded in *Derbyshire County Council v. Times Newspaper Ltd & Ors* that "under the common law of England a local authority does not have the right to maintain an action of damages for Defamation. That was the conclusion reached by the Court of Appeal, which did so principally by reference to art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ... to which the United Kingdom has adhered but has not been enacted into domestic laws ...

It is worthy to note that the relevant provisions of art. 10 of the European Convention states that:

> (i) ...
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for the preventing of disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Further at p. 550 of the judgment of *Derbyshire County Council v. Times Newspaper Limited*, it has been said that:

> As regards the words "necessary in a democratic society" in connection with the restrictions on the right to freedom of expression which may be properly be prescribed by law, the jurisprudence of the European Court of Human Rights has established that "necessary" requires the existence of a pressing social need, and that the restrictions should be no more than is proportionate to the legitimate aim pursued. The domestic courts have "a margin of appreciation" based upon local knowledge of the needs of the society to which they belong ...

Echoing what has been said in the judgment above, we, the local courts have the "margin appreciation" based upon local knowledge of the needs of the society to which we belong. This means that we do not and should not "copy and paste" the practice of other jurisdictions without considering the legal provisions, special needs and multi racial sensitivities of our society, not to mention that the other jurisdiction has different provisions with regard to freedom of expression and speech.

It is also to be noted that the United Kingdom has incorporated the European Convention into its domestic law ie, the Human Rights Act 1998. The preamble to the Human Rights Act 1998 states that it is:

> An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights ...

The United Kingdom had ratified the Convention on 8 March 1951 and it entered into force on 3 September 1953. The House of Lords in *R v. Secretary of State for the Home Department Ex-Parte Blind* [1991] AC 686 held that:

> The obligations of the United Kingdom, as a party to the Convention, are to secure to everyone within its jurisdiction the rights which the Convention defines including both the right to freedom of expression under Article 10 and the right under Article 13 to "an effective remedy before a national authority" for any violation of the other rights secured by the Convention. It is accepted, of course, by the appellants that, like any other treaty obligations which have not been embodied in the law by statute, the Convention is not part of the domestic law, That the Courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it. But it is already well settled that, in construing any provision in domestic

A legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it.

B Therefore I agree with the submission of the plaintiffs' counsel that the *Derbyshire County Council v. Times Newspaper Ltd & Ors* was decided to ensure that the United Kingdom complied with its international treaty obligations which were imposed by its accession to the Convention and therefore should not be C construed as a general development of the Common Law.

(ii) The judgment of *Derbyshire County Council v. Times Newspaper Ltd & Ors* at p. 547 by Lord Keith stressed on the features of a local authority which may be regarded as distinguishing it D from other types of corporation, whether trading or non trading. He said that:

> The most important of these features is that it is a governmental body which is a *democratically elected body, the electoral process nowadays conducted almost exclusively on party* E *political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any government body, should be open to uninhibited public criticism.* The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.

F This judgment specifically refers to the "democratically elected" local and central government of the United Kingdom. It would mean that it excluded the unelected government of other jurisdictions. This will create a curious situation that: in the UK their own elected government councilors should expect G unlimited criticism however unelected despots would be able to rely on the full protection of their libel laws.

In Malaysia, the local authorities or public authorities are not democratically elected (as explained in s. 10 of the Local H Government Act 1976). Hence they would seem to be excluded from the definition given by Lord Keith.

(iii) Further, one of the arguments in the *Derbyshire County Council v. Times Newspaper Limited* at p. 539 is that "If the council I were to succeed in this appeal, any governmental body with corporate status could bring libel proceedings against a newspaper or individual citizen alleged to have defamed its governing reputation. Such bodies would be able to wield the

very sharp sword of libel proceedings to deter or suppress public criticism and information about what they do as the people's representatives and public servants. They could do so using public funds and knowing that an ordinary individual citizen could not afford access to justice to defend his freedom of political expression against such claim. This is not a hypothetical matter: the defendant in Bognor Regis case ... was completely ruined by the legal costs of defending a libel trial ..." It is also observed that in the event that a libel suit is instituted, the public authorities will be relying on public funds to institute libel proceedings against the public. This is considered to be inappropriate.

However, the argument and the observation as stated above does not justify the ruling that allows libel suit to be instituted by the councilors of local authorities in cases where the imputation is against the same. More often than not, the funds of the local authorities and municipalities would still be used to institute libel action by these councilors.

(iv) Further I am of the view that freedom of expression under the European Convention is not unlimited. It is subject to "restriction which are prescribed by law, or necessary in a democratic society or necessary for the protection of reputation or rights of others."

Of relevance are the words of J Rajah in *Chee Siok Chin & Ors v. Minister for Home Affairs and Another* [2006] 1 SLR 582 which is a case closer to our shores, that states that the article on the freedom of free speech "do not confer absolute or immutable rights. The rights conferred by the article can be restricted in the wider interests of, *inter alia*, the public order so that they do not impinge on or affect the rights of others".

(v) The dissenting judgment of Mahoney JA's observation in *Ballina Shire Council v. Ringland* that "it is not apparent that, in relation to the right to defame public authorities the balance achieved by the law of defamation is wrong, or that, if it be wrong, it cannot be adjusted by anything less than a complete withdrawal of the law" ie, only Parliament can restrict the right to sue. While freedom of speech is a fundamental good, the ends to be achieved by that good "can effectively be achieved without removing all limits upon the criticism of public authorities." The consequences of *Derbyshire* is that "the power of the media in respect of public authorities is to be uncontrolled." This cannot be the position in this country.

[52] Further it is to be noted that in *Mayor, Citizens and Aldermen of Manchester v. Williams*, the court found that the statement of claim relied on by the municipal corporation disclosed no cause of action for the following reasons:

(i) the libel contained of, affected only the personal reputations of certain individuals and not the corporation's property;

(ii) the alleged imputations of bribery and corruption related to conduct which a corporation could not commit.

[53] It would seem that if those grounds were not present, the municipal corporations would have had standing to sue.

[54] Further there is the argument from the cases cited that it is not in the public interest of the local authority to sue for defamation. Apart from the fact that the plaintiffs are not "local authorities", this argument relates to the role played by the 1st and the 2nd plaintiff and to determine this, it involves the determination of issues of facts and law. At this juncture (before full trial) considering what is before the court, the court is in no position to determine this question in vacuum.

[55] Felda is given the right to sue and be sued by the Act, and it remains to be so. Until and unless Parliament says otherwise, it is not for the courts to restrict that right.

[56] What we should be addressing is whether extended qualified privilege defence applies to the matter complained of, and not whether the body has a standing to sue. To do otherwise will be opening floodgates for uninhibited malicious statements which are false and untrue hurled.

[57] Parke B in his judgment in *Toogood v. Spyring* [1834] 1 CM & R 181 at p. 193 stated:

> In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, and the law considers such publication as malicious, unless it is fairly made by a person in the discharge some, public or private duty whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society.

[58] Similarly in the Court of Appeal case of *Adam v. Ward* [1915] 31 TLR 299 (CA), where Buckley LJ correctly stated the principle of common law privilege when he stated at p. 304 that: A

> if the matter is matter of public interest and the party who publishes it owes a duty to communicate it to the public, the publication is privileged, and in this sense duty means not a duty as matter of law, but to quote Lord Justice Lindley's words in *Stuart v. Bell* 17 TLR 502; [1891] 2 QB 341, 350] 'a duty recognized by English people of ordinary intelligence and moral principle but at the same time not a duty enforceable by legal proceedings' ... B C

[59] The House of Lords in *Adam v. Ward* [1917] AC 309 (HL) accepted the above formulation of Buckley LJ when Lord Atkinson said at p. 334:

> A privileged occasion is .... an occasion where the person who makes a communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. D

[60] In *Blackshaw Lord* [1984] 1 QB 1 it has been held by the Court of Appeal of England that common law privilege applies where defamatory information is published in pursuance of a legal, social or moral duty to persons having a corresponding duty or interest to receive it. However it was stated that this privilege does not cover 'fair information on a matter of public interest' where there is no duty to publish. E F

[61] Hence for the above reasons, I ruled that the plaintiffs have the *locus* to maintain the action against the defendant. Whether it will be successful in its action remains to be tried. G

The Main Trial

[62] The plaintiffs have called four witnesses. Whilst the defendant opted for no case to answer. H

[63] There are three fundamental elements that the plaintiffs have to establish in an action for defamation ie,: I

(i) the words complained of were defamatory in nature;

(ii) the words complained of refer to the Plaintiffs;

(iii) there was publication to a 3rd party.

A **Whether The Words Are Defamatory**

[64] The relevant words:

> ... Datuk Dr Tan Kee Kwong mendedahkan hanya tiga individu yang terlibat dalam membuat keputusan pembinaan bangunan baru
B Felda yang dianggarkan bernilai RM662 Juta.
>
> Menurutnya, kemusykilan timbul apabila kelulusan pembinaan bangunan di kawasan itu dilakukan oleh anak syarikatnya. Felda Global Ventures Holding (Felda Global) yang diketuai
C Presidennya, Datuk Bakke Salleh tanpa pengetahuan pengerusi dan ahli lembaga pengarah.
>
> Sekitar tahun 2007, tanpa pengetahuan pengerusi dan Ketua Pangarah Felda, satu pertemuan diadakan di pejabat Timbalan Perdana Menteri, Datuk Seri Najib di Putrajaya, turut sama dalam
D pertemuan itu adalah Allahyarham Tan Sri SM Nasimuddin SM Amin, mewakili NAZA TTDI dan juga Pengarah Urusan Felda, Datuk Bakke Salleh.
>
> Menurut Dr Tan, pembinaan bangunan itu yang hanya diputuskan oleh tiga individu sahaja menjadi satu factor berlakunya begitu
E banyak pembaziran yang menyebabkan Felda kini menuju kearah kebankrapan ...

[65] In *South Hetton Coal Company v. North Eastern News Association Ltd* [1894] 1 QB 133 the court stated the tests that is
F to be applied with regards to a libel case involving a firm or a company in determining whether the impugned words are defamatory or that the words are capable of being defamatory. At p. 139 the court stated that:

> With regard to a firm or a company, it is impossible to lay down
G an exhaustive rule as to what would be libel on them. But the same rule is applicable to a statement made with regard to them. Statements may be made with regard to their mode of carrying on business, such as to lead people of ordinary sense to the opinion that they conduct their business badly and inefficiently. If
H so, the law will be the same in their case as in that of an individual, and the statement would be libelous.
>
> ... the only question would have been whether it contained statements with regard to the conduct by the plaintiffs' company of their business, tending to show that it was improper and
I inefficient as to bring them into contempt or discredit. If the jury found that it did, the plaintiffs would be entitled to damages at large, without giving any evidence of particular damage.

[66] We have a local case which laid down the test as can be found in the Court of Appeal case of *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461 p. 466. In this case the court of laid down the tests which lies in the question of:

> ... do the words published in their natural and ordinary meaning impute to the Plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory. (See *JB Jeyaretnam v. Goh Chok Tong* [1985] 3 MLJ 334.)

[67] The judgment in the case of *Tun Datuk Patinggi Haji Abdul–Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304 judgment was expressly adopted by the Court of Appeal in *Chok Foo Choo*'s case. The court states thus:

> The approach in the construction of the words complained of is to consider the meaning such words would convey to ordinary reasonable persons using their general knowledge and common sense. It is not confined to strict literal meaning of the words but extends to any reference or implication from which persons can reasonably draw … It is irrelevant what the publisher intended the words complained of to mean ... It is also irrelevant what the readers understood the words complained of to mean for the purpose of deciding their ordinary and natural meaning ... There is also no necessity for a plaintiff to prove falsity of the words complained of once they are found to be defamatory of him ...
>
> ... the test to be considered is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally …
>
> Thus the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion, although no one believes the statement to be true …
>
> ... the words complained of must be considered as a whole, bearing in mind, *inter alia*, the context in which they were used ...
>
> ..... The test according to the authorities is whether, under the circumstances in which the writing was published, a reasonable man to whom the publication was made would be likely to understand it in a libelous sense.

[68] Applying the test as enunciated above, what would a reasonable man thinks after reading the article.

[69] I am of the view that, in these circumstances the words, in their natural and ordinary meaning, were understood, to an ordinary person using his general knowledge and common sense to mean that the plaintiff carrying out the decision to acquire a RM662 million building by way of a decision of three individuals, one of whom is the late Tan Sri Nasimuddin who had nothing to do with the plaintiffs was a "pembaziran". The allegation of "pembaziran" (wastage) thereby imputing that the plaintiff was badly managed, they have no proper governance and conducted affairs in a dubious and unprofessional manner and made financial decisions which resulted in substantial losses. Therefore such words are capable of being defamatory of the plaintiffs.

[70] Clearly the words are defamatory. The words attack the plaintiffs in the manner of conducting its affairs which led to a lot of financial wastage and now left Felda into a state of bankruptcy. The words have accused the plaintiffs of mismanagement and had attack its financial position.

[71] If one is to consider the words then they could have most of the meaning which the plaintiffs have pleaded at para. 9 of the statement of claim.

[72] The sting of the words lies in the allegation of mismanagement which certainly has a tendency to cast an adverse opinion of the plaintiffs and to lower the estimation of the plaintiffs in the eyes of the public and society.

Whether The Words Refer To The Plaintiffs

[73] The defendant submits that reading the article at p. 2 of bundle B shows that none of the paragraphs which was deemed defamatory refers to the plaintiff. At best the defamation was against the three individuals which was alleged in the article. The article does not allege that Felda makes the decision and that Felda wasted public funds. The defendant submits that the word "kebankrapan" was specifically denied. The sting was actually against the three individuals. The defendant submits that in fact Felda was the victim of the frolic of these three individuals. The allegation is that the acts of these three peoples have caused Felda a lot of money. The defendant submits that this was agreed when it was suggested to the witnesses of the plaintiffs. In short Felda is the victim. Nowhere in the article does it said that Felda went on a frolic on its own to lose a lot of money.

[74] The defendant further submits that the pleading at para. 9 p. 25, para. (a) to (o) shows that none of the *innuendo* from these paragraphs can be attributed to Felda. It was also submitted that: A

- It was never suggested in the article that Felda did this to benefit cronies. Refer to p. 27 of the ikatan A. B

- Nowhere the allegation that plaintiff was involved in corruption or unlawful act.

[75] At the end of it all the sting is towards the three individuals, not Felda. C

[76] I disagree with the submission by the defendant that the sting is to the three individuals only.

[77] There is no ambiguity whatsoever that the words refer to the plaintiffs because both the plaintiffs are expressly referred to by name in the article. Specific reference to the 1st and the 2nd plaintiffs were made in the article: D

> ... Datuk Dr Tan Kee Kwong mendedahkan hanya tiga individu yang terlibat dalam membuat keputusan pembinaan bangunan baru Felda yang dianggarkan bernilai RM662 Juta. E
>
> Menurutnya, kemusykilan timbul apabila kelulusan pembinaan bangunan di kawasan itu dilakukan oleh anak syarikatnya. Felda Global Ventures Holding (Felda Global) yang diketuai Presidennya, Datuk Bakke Salleh tanpa pengetahuan pengerusi dan ahli lembaga pengarah. F
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> Sekitar tahun 2007, tanpa pengetahuan pengerusi dan Ketua Pangarah Felda, satu pertemuan diadakan di pejabat Timbalan Perdana Menteri, Datuk Seri Najib di Putrajaya, turut sama dalam pertemuan itu adalah Allahyarham Tan Sri SM Nasimuddin SM Amin, mswakili NAZA TTDI dan juga Pengarah Urusan Felda, Datuk Bakke Salleh. G
>
> Menurut Dr Tan, pembinaan bangunan itu yang hanya diputuskan oleh tiga individu sahaja menjadi satu factor berlakunya begitu banyak pembaziran yang menyebabkan Felda kini menuju kearah kebankrapan ... H

[78] Gatley in *Libel and Slander*, 9th edn at para. 32.16, the learned author stats that:

> Where the Plaintiff is named in the libel no difficulty can arise. No evidence that there were readers who identified the plaintiff is necessary, as the plaintiff only has to establish that persons could have identified him from the words used, which plainly they could if he was expressly named. I

[79] Since the plaintiffs were expressly named, there is no issue pertaining to identification of the plaintiff in the article. Due to the true construction of the words of the article it is clear that the imputation is that it was the plaintiffs who were involved in mismanagement.

[80] Further, the article said that these entities are mismanaged in such a way that a decision to build the building for RM662 million is made without the knowledge of the Board of Directors or the chairman of the company. The sting of the article is directed to the way in which the plaintiffs, the two companies named here are managed.

[81] Para 7 of the statement of claim is not just an allegation which is confined to the three individuals but the sting of the allegation is directed at plaintiffs because what is stated in the article is that the decision to build the building was only decided by three individuals. This imputes a shoddy kind of corporate governance and management in the plaintiffs.

[82] The defendant had also suggested that the sting was not directed at Felda Global Ventures Holding, the 2nd plaintiff, but the clear words of the article are directed at mismanagement by Felda Global Ventures Holdings Sdn Bhd as the article mentioned "kelulusan pembangunan dikawasan itu dilakukan oleh anak syarikatnya Felda Global ..." So it expressly states that Felda Global Ventures Holdings Sdn Bhd committed a wrong and that wrong was carried out by its head, Datuk Mohd Bakke Salleh without the knowledge of the Chairman and BOD.

[83] I am of the view that if the one is to construe the words of the impugned article it is clear that they directly attack the plaintiffs in the manner they managed their affairs and there was a fundamental allegation of mismanagement (Refer to *South Hetton Coal v. North Eastern New Association Ltd*).

Whether It Was Published

[84] The words were published in Suara Keadilan. This is a non issue.

Whether The Defamatory Words Were Uttered By The Defendant

[85] Slander in the law of defamation is oral defamation as opposed to libel which is written defamation. Allegation is that there was oral defamation when the defendant allegedly said these to Faisal Zakaria.

[86] Para 6 of statement of claim is referred at p. 24 of the ikatan A. This is the written defamation which is libel and the allegation against the defendant is that he caused or permitted to be published these words.

[87] At para. 7 of the statement of claim it is pleaded that the words were uttered and published by the defendant.

[88] In the issues to be tried, the first issue is whether the defendant uttered the words to Faisal.

[89] It is the burden of the plaintiff to prove that the defendant published or caused to be published the alleged defamatory words.

[90] For there to be publication, plaintiff must prove that there must be communication of the words to third party ie, Faisal Zakaria, the reporter.

[91] There cannot be defamation of a plaintiff if the impugned words were said to him, or published to him. There must be a third party involved.

[92] In the present case, Faisal Zakaria, the reporter was not called to testify. This is crucial to the case.

[93] The plaintiffs' witnesses could not positively confirm whether the defendant did utter the defamatory words to Faisal Zakaria and subsequently, caused it to be published, as they were never at the interview which the defendant gave to Faisal Zakaria.

[94] After the plaintiffs' witnesses were called to testify, the plaintiffs' counsel applied for a short adjournment in view that a subpoena was applied for in an attempt to secure Faisal Zakaria to testify. However the application for an adjournment was refused as the subpoena was applied on the hearing date at the eleventh hour when the existence of Faisal Zakaria was well within the knowledge of the plaintiffs ever since the writ and statement of claim was filed.

[95] Only Faisal Zakaria can throw light of whether the defendant did utter what he is alleged to have said. (Refer to s. 60(1)(b) of the Evidence Act 1950).

[96] Apart from the failure to call Faisal Zakaria, the plaintiff failed to prove that the defendant was responsible for the publication of the report, What has been produced in evidence is bundle B p. 2 which has been marked as P-2. It is trite law that

newspaper report is hearsay evidence In *Karpal Singh v. Sultan of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) 686, Abdul Hamid Omar CJ (Malaya) said at p. 689:

> ... I ... observe that the sole foundation of the originating summons is the statement allegedly made by the Sultan as reported in the New Straits Times and The Star newspapers on 27 July 1987. There is no affidavit before the court affirmed to by the reporter concerned stating that he heard the Sultan made such statement. The press reports of what the Sultan is reported to have said would appear to be inadmissible as hearsay. The fact that the Sultan has not contradicted the press reports does not, in my view, make the slightest difference for it is well established that inadmissible evidence does not become admissible by reason of a failure to object.

[97] The same case refers to the judgment of the Supreme Court of India in *Samont N Balakrishna v. George Fernandez* [1969] 3 SCR 603 which stated that:

> A newspaper report without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well known that reporters collect information and pass it onto editor who edits the news item and then publishes it. In this process, the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible.

[98] Given the circumstances in the present case, even with the admission of the newspaper report, the weight to be attached to it is very negligible. This was illustrated in the case of *Dato Seri S Samy Vellu v. Penerbitan Sahabat (M) Sdn Bhd & Ors* [2005] 3 CLJ 440 where the article in the Malay Mail was also exhibited as DSV-6. Still the court held that the plaintiff must prove the articles even if it had been tendered as an exhibit, unless off course, the defendant admits as to its contents. Refer to p. 492 at held (4) of the case.

[99] The impugned article is in bundle B. It is the norm that documents in part A are documents where the authenticity and the contents are admitted. Whereas the documents in part B are documents admitted but contents are disputed. Part C are documents where there are dispute as to authenticity and contents.

[100] The defendant never denied the authenticity of the reports in Suara Keadilan. Admissibility of the documents does not mean that the contents are proven.

[101] The defendant has made it clear that not only that the contents of the articles are disputed, the defendant made it as an issue to be tried.

[102] It was never an agreed fact that the defendant uttered those words to the reporter. What was agreed was that the defendant did give an interview to Faizal Zakaria. It is not disputed that there was publication of the articles in Suara Keadilan subsequent to the interview but it was not proven that the defamatory words published in the article were the words of the defendant.

[103] From the start the plaintiff were well aware that they have to prove this issue by calling Faisal Zakaria or anyone who was there who heard the defendant uttered the said words. All of the plaintiffs' witnesses said they were not at the interview which the defendant had with Faisal Zakaria.

[104] It is trite law that a hearsay evidence remains as hearsay although parties did not object.

[105] Therefore the failure of the plaintiff to call Faisal Zakaria proves to be fatal to the plaintiffs' case. It is not proven that the defendant did utter the defamatory words to a third party.

[106] Clearly the plaintiffs have failed to prove an essential element of the tort ie, that the defamatory words were uttered by the defendant and that he had caused the same to be published in Suara Keadilan.

[107] The defendant raised a point as to whether the plaintiff has proven that the defendant knew or ought to have known that what he purportedly said would be published or that he intended that the article would be published.

[108] Suara Keadilan was the one who published the words. The plaintiffs have not proven that the defendant knew or ought to have known that what he purportedly said would be published or that he intended/permitted/ caused the article to be published. The plaintiffs failed to prove this by the failure to call Faizal Zakaria.

[109] Based on this ground alone, the claim by the plaintiff is dismissed with costs.